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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 325 & 2

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Appellee.

ORGANIZED VILLAGE OF KAKE,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Appellee.

No. 327 & 3

ANGOON COMMUNITY ASSOCIATION,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Appellee.

ON APPEAL FROM THE DISTRICT COURT FOR THE STATE OF ALASKA

BRIEF OF APPELLEE IN REPLY TO BRIEFS OPPOSING MOTION TO AFFIRM OR DISMISS

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ORGANIZATION OF BRIEF

There are several reasons why the United States Supreme Court should not take jurisdiction of this case at this time. They may be summarized as follows:

1. The issues before the district court judge are now moot.
2. Those which are not moot are speculative.

3. The district court is not the highest court of the State in which a decision could be had.

Points one and two, above, were discussed in the appellee's brief in support of its Motion to Affirm or Dismiss and will not be argued further at this time. Accordingly, the argument in this reply brief will be limited to a discussion of point number 3, above. In order to place the argument in its proper perspective, a chronological historical statement will be necessary. The brief will therefore contain: (1) a historical statement; (2) a statement of issues raised; (3) a brief argument; and (4) a conclusion.

Historical Statement

1. *January 3, 1959,* Alaska admitted to the Union. Pursuant to presidential proclamation, Alaska was admitted to the Union "on an equal footing with the other States of the Union" at one minute past noon on the third day of January, 1959. (F.R. Doc. 59-169; Filed Jan. 5, 1959, 10:59 A.M.)

2. *January 3, 1959,* State Constitution took effect. Article XV, Section 25, provides as follows:

> "This constitution shall take effect immediately upon the admission of Alaska into the Union as a state."

(a) The State Constitution, in its "Schedule of Transitional Measures," Article XV, provides, *inter alia:*

> "Section 17. Transfer of court jurisdiction. Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system *shall remain as constituted* on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced

and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law." (Emphasis added)

(b) The State Constitution, in Article IV, entitled "THE JUDICIARY," provides, in pertinent part, as follows:

"Section 1. Judicial power and jurisdiction. The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

"Section 2. Supreme Court. The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court."

3. *January 3, 1959,* Statehood Act became fully effective. The Statehood Act, Pub. Law 85-508, 72 Stat. 339, provides for a transitional court system in the following language:

"Sec. 18. The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, *shall not be effective until three years after the effective date of this Act,* unless the President, by Ex-

ecutive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section." (Emphasis added)

4. *June 16, 1959,* Ninth Circuit Court ruled against its jurisdiction. On June 16, 1959, in the case of *Parker* v. *McCarrey,* 268 F. 2d 907, the United States Court of Appeals, Ninth Circuit,[1] ruled that it had no jurisdiction to review judgments rendered in the District Court for the Territory of Alaska after January 3, 1959, i.e., after statehood. The petitioners in the case sought writs of prohibition and mandamus directed to the Honorable J. L. McCarrey, Jr., District Judge of the District Court for the Territory of Alaska. The Attorney General of Alaska filed a brief as *amicus curiae,* urging, *inter alia,* that the Ninth Circuit Court of Appeals had jurisdiction to hear cases from the "transitional" district court under the provisions of the Statehood Act, § 18, *supra,* wherein the pro-

[1] At the time *Parker* v. *McCarrey* was before the Ninth Circuit Court, a similar suit, entitled *Kilpatrick* v. *McCarrey,* also involving a motion for leave to file a Petition for Writ of Prohibition and Mandamus, was before the United States Supreme Court. The Attorney General of Alaska joined as *amicus curiae* and submitted a brief *in this Court* wherein substantially the same arguments as were presented to the Ninth Circuit Court of Appeals in *Parker* v. *McCarrey* were made. The motion was denied. (No. 856, Misc., 360 U.S. 914, 3 L. ed. 2d 1532.)

visions of the "preceding sections" were suspended for up to three years, thereby, under the State's theory, leaving the Ninth Circuit Court of Appeals as well as the district court free to "function as heretofore." As aforesaid, the State's theory was not accepted. The court, incidentally, refused to comment on the nature of the "transitional" court. The language of the court leaves little doubt as to its policy in discussing the nature of the State's transitional court system:

> "In the spirit of helpfulness we might give our views on the current Alaska court situation, but if we cannot speak with the authority of a pronouncement that is required for decision, we deem it unwise to speculate as to the nature of the interim court. Thus, we must leave it on the basis of that which it is not, rather than on that which it is."

5. *June 22 and 23, 1959,* plaintiff below filed complaints seeking injunction. On the 22nd day of June, 1959, in the cases of *Kake and Angoon* v. *Egan,* and on the 23rd day of June, 1959, in the case of *Metlakatla* v. *Egan* (which suits were consolidated in the court below and are now reported in 174 F. Supp. 500), the plaintiffs filed complaints for injunctive relief. They sought to restrain the enforcement of state statutes banning fish traps. On June 29, 1959, in the district court at Juneau where the cases were argued, and before the parties began presenting their arguments to the court, the Honorable Raymond J. Kelly, district court judge, made a statement as to jurisdiction which appears in full in the record at page 130. The district judge said, in part:

> ". . . This is an interim court during the transition of the judicial system from the Territorial to the State status. As far as the Statehood Act is concerned, we

enjoy a dual personality. Whatever might be said in reference to the Federal end of it, there certainly seems to be no question at this time but what we are acting *as a State Court.*" (Emphasis added)

6. *July 10, 1959,* oral argument before Justice Brennan. The district court, upon motion of the defendant and after a two-day hearing, dismissed the complaints. Appeal was accordingly made to the only court available at that time, i.e., the United States Supreme Court, for an injunction pending appeal. Oral argument was had before Justice Brennan on July 10, 1959. The injunction was granted. During the course of oral argument, concern was expressed by all parties as to certain jurisdictional aspects of the case. The State did not, at that time, oppose jurisdiction. However, Chapter 151, Session Laws of Alaska 1959, effective May 1, 1959, had provided (subject to appointment of justices for the state supreme court, etc.) for appeals from the transitional district court to the Supreme Court of Alaska. Chapter 151 (amending Chapter 50, Session Laws of Alaska) provides, in pertinent part, as follows:

"... In the event that a court of competent jurisdiction, by final judgment, declares that the United States Court of Appeals for the Ninth Circuit lacks jurisdiction to hear appeals from the District Court of the District of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court and appeals from the District Court of the District of Alaska may be made to the State Supreme Court...."

Justice Brennan asked the Attorney General, during oral argument, when the supreme court justices might be expected to be appointed; and a tentative schedule, based

upon such information as was available at that time, was furnished. In his opinion of July 11, 1959, Justice Brennan, at page 9, expressed interest in the jurisdiction of the United States Supreme Court to entertain this case on appeal in the following language:

> "Another question which will face this Court is whether it has jurisdiction to review the judgment of the District Court. Jurisdiction was not questioned by the parties of the Solicitor General of the United States on the oral argument, but the petitioners indicated that they will seek review on the theory that the judgment below is a judgment of the highest available court of the State. I am satisfied that there is a prospect that the Court will want to take the case to decide *whether it has jurisdiction in this regard.*" (Emphasis added)

The State, on oral argument, reserved the question whether appeal or certiorari lay to the United States Supreme Court, as well as other jurisdictional questions.

7. *July 29, 1959,* state supreme court justices appointed. The state supreme court justices were appointed by Governor William A. Egan on the 29th of July, 1959.[2]

8. *October 5, 1959,* state supreme court rules became effective. The Supreme Court of Alaska has, since the State submitted its Motion to Affirm or Dismiss on September 16, 1959, published the supreme court rules, to be effective October 5, 1959. Rule 54(a) provides as follows:

> "(a) *Appeals from District Court.* These rules shall be applicable to appeals from the District Court of the

[2] In this connection, it is interesting to note that on November 9, 1959, the Governor appointed the eight superior court judges, who will take office on November 27, 1959. The rules of civil and criminal procedure for the superior and magistrates courts have just been published. The State expects to have its full judicial system in operation by the first of the year or shortly thereafter.

> District of Alaska which may be allowed in accordance with the provisions of Section 32 (4) of Chapter 50 SLA 1959, as amended by Chapter 151 SLA 1959."

The time for filing notice of appeal was extended by the state supreme court to allow appeals from judgments rendered since statehood (January 3, 1959). The pertinent rule—Rule 54(b)—provides:

> "(b) *Time for Filing Notice of Appeal.* The time for filing a notice of appeal as provided in these rules is extended so that the time for filing such notice will begin to run from the effective date of these rules instead of the effective date of the judgment."

Rule 7 of the new state supreme court rules clearly shows that the appellants herein still have ample time within which to file notice of appeal.

> "Rule 7. *Appeal: Time—Notice—Bonds.*
>
> "(a) *When Taken.* The time within which an appeal may be taken to the supreme court shall be thirty (30) days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the state or an officer or agency thereof is a party, the time as to all parties shall be sixty (60) days from such entry, . . ."

Issues Raised

The foregoing events, when considered from the standpoint of jurisdiction, raise a number of issues. These will now be considered.

1. In the court below there was drawn into question the validity of two state statutes—Chapters 17 and 95, SLA 1959. The plaintiffs sought to enjoin the Governor from enforcing the same on the ground of repugnance to

the Constitution and laws of the United States (complaint of Angoon, R-33; complaint of Kake, R-11; complaint of Metlakatla, page 13.). The question is therefore pertinent whether the lower court was a "district court" within the meaning of § 2281 of Title 28 U.S.C., wherein it is provided that:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any *district court* or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Emphasis added)

All the necessary allegations to support federal jurisdiction were made in the complaints below (e.g., the complaint of Metlakatla in the district court, p. 8); and it appears that the petitioners, in drafting the complaints, were fully prepared to treat the lower court as a federal court.

2. Assuming that the lower court was a "district court" within the meaning of § 2281 of Title 28 U.S.C., would it have been possible for a three-judge court to have been convened in view of the provision in § 2284 of Title 28 U.S.C., which requires that the chief judge of the circuit:

> ". . . designate two other judges, at least one of whom *shall be a circuit judge. . . .*" (Emphasis added)

It is at best doubtful whether such a court could have been convened in view of the decision in *Parker* v. *McCarrey, supra,* wherein it was decided by the Ninth Circuit

Court of Appeals that it had no jurisdiction over appeals from the interim or transitional state courts in Alaska. In the absence of jurisdiction, how could the circuit court provide a circuit judge?

3. Assuming, on the other hand, that the lower court was, for the purposes of the instant case at least, a state court, was not the lower court bound by existing state statutes as to jurisdiction of the state supreme court in the case of appeals as provided for in Chapter 151, SLA 1959, *supra*?

Are federal questions raised if doubt exists concerning jurisdiction of appeals from the interim courts to the state supreme court, or are questions involving the state judiciary purely matters of state concern? If the state supreme court provides in its rules for appeals from the interim courts, are any federal questions involved when and if those rules are attacked?

4. Justice Brennan took jurisdiction of the case in order to protect an asserted federal right by means of a temporary injunction. A state statute, at the time he granted interlocutory relief, provided that the impending state supreme court would have jurisdiction to hear appeals from judgments rendered in the interim district courts since January 3, 1959. Query: Is there a difference in taking jurisdiction in order to protect, by way of interlocutory relief such as a temporary injunction, an asserted federal right, and taking jurisdiction of a case for the purpose of making a determination on the merits? In other words, could the United States Supreme Court take jurisdiction in order to grant interlocutory relief while being precluded (by the existence or imminent creation of a state remedy) from granting final relief pursuant to a hearing on the merits?

5. Does the Supreme Court of Alaska have the exclusive right to hear the appeal in the instant case at this

time, or has the United States Supreme Court, having once taken jurisdiction—even though for a limited purpose —acquired an "indefeasible" jurisdiction?

6. Does the creation by a state of a court with appellate jurisdiction (by relation back) over an existing tribunal constitute a denial of any state or federal right to those who have (perhaps erroneously) relied upon the judgment of such existing tribunal as a "final judgment"?[3]

7. Alaska can and did consent to the continuing federal appellate jurisdiction of the Ninth Circuit Court of Appeals. (See § 17, Art. XV, of the State Constitution, *supra*, wherein "the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admis-

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[3] *Freeborn* v. *Smith*, 2 Wall. 160, 17 L. ed. 922 (1865) is an instructive case which was commenced in the District Court for the District of Nevada while Nevada was still a territory. The trial resulted in a verdict for the plaintiffs and a motion for a new trial was overruled. The case went to the Supreme Court of the Territory, and affirmed. The case then came to the United States Supreme Court on a writ of error. Pending the writ of error, the Territory of Nevada became a state.

The Nevada Statehood Act made no provision for the cases then pending in the United States Supreme Court after statehood. Defendants in error moved to dismiss on the authority of *Benner* v. *Porter*, adjudging that the Supreme Court had no jurisdiction to review such a case without the further authority of Congress, for the reason that the territorial court, in which the judgment was rendered, was no longer in existence.

The hearing was postponed in order to allow Congress to provide for such cases. Congress did so.

It was argued that the subsequent legislation of Congress is ineffectual as a retrospective act interfering with vested rights; that the result of maintaining it would be *"to disturb and impair judgments, which at the time of its passage, were final and absolute."* (Emphasis added)

The court used language which may be appropos to our case:

> "It is well settled that where there is no direct constitutional prohibition, *a State may pass retrospective laws, such as, in their operation, may affect suits pending and give a party a remedy which he did not previously possess:* or modify an existing remedy, *or remove an impediment in the way of legal proceedings." Em*phasis added)

sion" until the courts provided for in Article IV of the State Constitution are formed.) The circuit court interprets the Statehood Act so as to deny appellate jurisdiction, notwithstanding the fact that Congress, in granting statehood, "accepted, ratified, and confirmed" the State Constitution. Two United States District Judges, in two different cases, held that the Ninth Circuit Court of Appeals had jurisdiction over both state and federal cases on appeal from the interim district courts in Alaska. (See *United States* v. *Egelak,* 173 F. Supp. 206; *United States* v. *Marone,* 172 F. Supp. 368.) In the latter case, quoted with approval in the former, the Court said:

> "I am of the opinion that there is a simple answer to this problem and that is that the United States Court of Appeals for the Ninth Circuit never lost its appellate jurisdiction over the present United States District Court in Alaska in either state or federal matters."

It may well be that a conflict between state and federal law is raised by virtue of conflicting interpretations of § 18 of the Statehood Act as evidenced by the decision of the Ninth Circuit in the *Parker* case and the contrary state decisions just referred to. Whether jurisdiction over appeals to the United States Supreme Court from the interim district courts is affected by the existence of such a conflict over a law having both federal and state overtones, is uncertain.

Argument

The State does not have answers to all the questions which have been raised in this brief. We believe, however, that in a case where all parties consented that the lower court was acting as a state court, in a case where it is virtually certain that the lower court COULD NOT have acted as a federal court (in view of the three-judge court dilemma,

supra), the furnishing of an appeal retroactively does not violate any state or federal right. (See *Freeborn* v. *Smith*, *supra*.)

We do not believe that the United States Supreme Court had jurisdiction to hear this case on its merits at the time oral argument was had before Justice Brennan, nor do we believe that such jurisdiction is vested in the United States Supreme Court at this time. We base the foregoing conclusion upon the fact that state law, at all times pertinent herein, provided for eventual appeal of decisions rendered in the interim district courts to the state supreme court.

We concede, however, that the United States Supreme Court may have had jurisdiction to grant interlocutory relief to protect a federal right.

If the above conclusions are sound, then the provisions of 28 U.S.C., § 1257, requiring that this Court hear appeals only from the highest court of the state in which a decision could be had, are fully applicable. That the decision, to be reviewable, must be from the highest court of the state in which a decision could be had is beyond question. *Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551. Accordingly, the appellants herein must file notice of appeal in the Supreme Court of Alaska and prosecute the same to judgment prior to invoking jurisdiction of this Court for a review on the merits.

The foregoing possibilities and tentative conclusions are submitted to the Court as above indicated not necessarily because we believe that we can present at this time compelling answers, but rather as additional argument as to why this Court should not take the case on its merits when the same is essentially moot. We believe that the moot and speculative argument earlier presented makes it unnecessary to delve into the almost impossible legal tangle which exists in the state and federal judicial system due to the

Parker v. *McCarrey* opinion. Because these matters involve grave constitutional questions of state and federal relationships, we feel certain that this Court will not be anxious to determine such questions if there is another sound basis for the disposition of the litigation. If, as a practical matter, the case is determined to be moot, it is submitted that future litigation, if any, concerning this matter will undoubtedly arise subsequent to January 1, 1960, subsequent to the creation of the full state judicial system, and subsequent to the proclamation of the President creating the constitutional United States District Court for the District of Alaska, as provided in § 18 of the Statehood Act, *supra.*

When these events have transpired, and if the Secretary does engage in further regulation after January 1, and if such regulation is inconsistent with the State Constitution, then a justiciable controversy may be presented through normal, customary and usual court systems, whether federal or state, without the attendant confusion inherent in this litigation in its present posture.

Conclusion

This additional brief has been offered to further advise the Court of the development of the state judicial system and some of the problems inherent in federal-state relationships, which must of necessity be determined, if this case is heard on its merits. As indicated earlier, we do not attempt to definitively anwer these serious constitutional questions of federal and state relationships. We feel it is unnecessary to delve into these matters because, as we have argued before, the case is moot.

Dated at Juneau, Alaska, this 25th day of November, 1959.

Respectfully submitted,

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